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NORDIN MD ZAIN v. GLOMAC ALLIANCE SDN BHD

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[ORIGINATING SUMMONS NO: BA-24NCVC-1811-12-2019]
10 NOVEMBER 2020

B

CIVIL PROCEDURE: *Res judicata – Issues, similarity of – Claim for recovery of property consequential upon decisions in previous suit – Whether issues raised litigated in previous proceedings – Whether issue estoppel applied to bar re-litigation of findings in previous suit*

C

CIVIL PROCEDURE: *Locus standi – Capacity of bankrupt – Sanction – Whether bankrupt applied and obtained sanction of Director-General of Insolvency – Whether sanction specifically for present action – Bankruptcy Act 1967, s. 38(1)*

Score Option Sdn Bhd ('Score Option'), the registered and beneficial owner
D of a land, granted the absolute right to Austral Development Sdn Bhd ('Austral Development') to develop the land into a housing development known as 'Austral Yarra link'. By a sale and purchase agreement ('principal agreement') between the plaintiff, Austral Development and Score Option, the plaintiff purchased a two and half storey linked house in the Austral
E Yarra link housing development ('property'). By letter dated 15 January 2010, Austral Development confirmed that they 'have fully received the payments for the' property and that they had no further claims against the property. Austral Development also forwarded the original copy of the sale and purchase agreement and deed of mutual covenant to the plaintiff. On
F 21 January 2011, the receivers and managers of Score Option, appointed pursuant to a debenture between Malayan Banking Berhad and Score Option, entered into a sale and purchase agreement with the defendant, Glomac Alliance Sdn Bhd ('Glomac agreement') for a consideration of RM77 million to sell the land but strictly excluding 198 houses sold ('sold units') by Austral Development. Under cl. 5.02 of the Glomac agreement, the transfer of the
G land to Glomac was subject to the right and interest of the existing purchasers of the sold units, including the plaintiff. Clause 7A.01 of the Glomac agreement imposed an obligation upon Glomac to complete the construction and development of the sold units at its own costs and expenses. Further thereto, Glomac gave effect to the obligations as set out in Clause 5.02 and
H 7A.01 by transferring legal and beneficial ownership to other purchasers of the sold units. Austral Development was not a party to both the agreements. Both Score Option and Austral Development were subsequently, wound-up. Prior to the present suit, Glomac sued the plaintiff ('Suit No 259') for (i) a declaration that the principal agreement was null and void; and (ii) a
I declaration that Glomac was the rightful owner and/or registered and beneficial owner of the property. After a full trial, the Sessions Court ('SC') dismissed Glomac's claim against the plaintiff with costs. Glomac's appeals to the High Court and thereafter to the Court of Appeal, were dismissed.

The plaintiff commenced the present suit for, *inter alia*: (i) a declaration that the plaintiff was the legal and beneficial owner the property; (ii) an order that Glomac take all steps required to vest the legal and beneficial ownership of the property on the plaintiff by executing all necessary documents; (iii) an order that, if Glomac failed to comply with prayer (ii) within 14 days of this Order, the Deputy Registrar of the High Court is authorised to execute all necessary legal documents in favour of the plaintiff to vest the legal and beneficial ownership of the property on the plaintiff; (iv) an order that the defendant, within 14 days of this Order, forward to the plaintiff's solicitors, all security documents including but not limited to the issue document of title and any other document necessary to vest the legal and beneficial ownership of the property on the plaintiff; and (v) an order that, within 14 days of this order, Glomac deliver vacant possession of the property to the plaintiff. Glomac, in objecting to the plaintiff's claims contended that: (i) the doctrine of *res judicata* prevented the issues raised from being litigated due to the previous court proceedings; (ii) the plaintiff did not have the *locus standi* to initiate this action and had no cause of action against Glomac; and (iii) Glomac was not satisfied that the progress payment for the property had been made and/or that the principal agreement was *bona fide*.

Held (allowing plaintiff's claim):

(1) The plaintiff did not make any counterclaim in the previous suit and the SC did not decide on any counterclaim. Therefore, the plaintiff was not barred or estopped by *res judicata* from filing and maintaining the present suit for recovery of the property and related orders which flow from and/or consequential upon the decisions of the courts in the previous suit. Further, due to the exceptional circumstances of the present case, *res judicata*, in the wider sense, did not apply to bar or estop the plaintiff from filing the present suit to recover the very same property which was held by the court in Suit No. 259 to belong to the plaintiff. The courts in the previous suit held that the plaintiff was the true owner of the property and Glomac had no right to or interest in the property and the appeal had been exhausted. Glomac was therefore barred or estopped by *res judicata* from re-litigating or re-opening the ownership issue in the present suit. Moreover, issue estoppel also applied to bar or estop Glomac from re-litigating or re-contesting the findings and conclusions of the court in the previous suit. Hence, this court had the jurisdiction to make orders and grant reliefs in favour of the plaintiff that flowed from or were consequential upon or ancillary to the decision of the courts in the previous suit. (para 35 & 36)

(2) All the prayers in the plaintiff's originating summons were orders and/or reliefs that flowed from or ancillary to or consequential upon the court's decision in Suit No. 259, in light of the fact that (i) the plaintiff had been adjudged as the rightful owner of the property; (ii) the court in Suit No. 259 had conclusively held that Glomac had no proprietary

right to or interest in the property; (iii) the property had been completely constructed but Glomac, who was holding on to the possession and document of titles, refused to sign a transfer of the property to the plaintiff and further refused to give vacant possession of the property to the plaintiff. (para 39)

(3) A sanction must be specific and is not meant for multiple proceedings. The plaintiff, who was adjudged a bankrupt, had applied and obtained the sanction of the Director-General of Insolvency ('DGI') under s. 38(1) of the Bankruptcy Act 1967 to commence the present suit against Glomac. The representative of the DGI had confirmed that the sanction of the DGI was for the specific purpose of the plaintiff's suit against Glomac in connection with the property. The plaintiff was using the sanction only for the present suit only, and there was no other legal proceeding, actual or imminent or threatened, by Nordin against Glomac or any other person. In the premises, Glomac's argument on *locus standi* was rejected. (paras 42, 43 & 48-51)

(4) The courts in Suit No. 259 found and held that: (i) the plaintiff had fully paid the purchase price for the property by way of contra set-off; (ii) the contra set-off was *bona fide* and valid; and (iii) the plaintiff was the true beneficial owner. Thus, *res judicata* applied to bar or estop Glomac from re-litigating the decisions in Suit No. 259. Further or alternatively, issue estoppel applied in the present suit to bar or estop Glomac from questioning the findings of the court in Suit No. 259. In the premises, Glomac's argument against the fact that full payment had been made by the plaintiff for the property was rejected, and Glomac's argument against the *bona fides* of the principal agreement or the *bona fides* of the contra payment was dismissed. The plaintiff, as the true owner of the property, was entitled to have the title of the property transferred to him free from encumbrances and also the vacant possession of the property. (paras 53-56 & 58)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Azman Zain Ahmed Mohd Zin v. CIMB Bank Bhd [2013] 6 CLJ 862 HC ***(refd)***
Chew Thai Kay & Anor v. Tenaga Nasional Bhd [2020] 1 CLJ 97 HC ***(refd)***
Hoystead v. Commissioner of Income Tax [1926] AC 155 ***(refd)***
Ketua Pengarah Insolvensi v. Dato' Dr Chen Lip Keong & Ors [2011] 8 CLJ 393 CA ***(refd)***
Malayan United Finance Bhd v. Noormurni Sdn Bhd & Anor [1988] 1 CLJ 149; [1988] 1 CLJ (Rep) 190 SC ***(refd)***
Prestasia Sdn Bhd v. Mow Wai Lan [1995] 1 LNS 328 CA ***(refd)***
Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam [2006] 4 CLJ 458 CA ***(refd)***
Superintendent Of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC ***(refd)***
Yat Tung Investment v. Dao Heng Bank [1975] 2 WLR 69 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 38(1)
Housing Development (Control and Licensing) Act 1996, Schedule G
Insolvency Act 1967, s. 38(1)

For the plaintiff - T Nayagam; M/s Nayagam & Partners
For the defendant - Douglas Yee & Lim Pit Feng; M/s Douglas Yee

Reported by S Barathi

JUDGMENT

Tee Geok Hock JC:

Introduction

[1] It appears that the ordeal of this man of little means will not end with the decision of this court on 15 September 2020, although this is the fourth time he has come to the courts to seek justice.

[2] In the present suit commenced by originating summons, the plaintiff/ Nordin sought the following orders:

(i) a declaration that the plaintiff is the legal and beneficial owner of a two and half (2½)-storey linked house known as Lot No. 69, (Jalan Metro 1/10A) measuring approximately 153 square meters in the Austral Yarra Link housing development ("said property") which was purchased by way of a sale and purchase agreement dated 15 January 2010 between the plaintiff, Austral Development Sdn Bhd (Company No. 638830-A) and Score Option Sdn Bhd (Company No. 550356-V);

(ii) an order that within 14 days of this order the defendant takes all steps required to vest the legal and beneficial ownership of the said property on the plaintiff by executing all necessary documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff;

(iii) an order that if the defendant fails to comply with prayer ii hereinabove within 14 days of this order, the Deputy Registrar of the Shah Alam High Court is authorised to execute all necessary legal documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff to vest the legal and beneficial ownership of the said property on the plaintiff;

(iv) an order that the defendant within 14 days of this order forward to the plaintiff's solicitors all security documents including but not limited to the issue document of title and any other document necessary to vest the legal and beneficial ownership of the said property on the plaintiff;

(v) an order that within 14 days of this order the defendant delivers vacant possession of the said property to the plaintiff;

(vi) the costs of this action is paid by the defendant to the plaintiff; and

(vii) any further or other reliefs deemed fair and just by this Honourable Court.

[3] Prior to this suit, the plaintiff/Nordin was sued by the defendant/Glomac in Shah Alam Sessions Court Suit No. B52NCVC-259-11/2015 ("the previous Suit No. 259") whereby Glomac sought for the following orders;

(i) a declaration that the sale and purchase agreement dated 15 January 2015 between Austral Development Sdn Bhd (as vendor), Score Option Sdn Bhd (as proprietor) and Nordin (as purchaser) in respect of ten unit of 2½-storey residential house (the said property) was null and void; and

(ii) a declaration that Glomac was the rightful owner and/or registered owner of the said property.

[4] In the previous Suit No. 259, Nordin filed a defence but did not add a counterclaim for a declaration that Nordin was the rightful owner or for any consequential relief.

[5] The previous Suit No. 259 of the Glomac was dismissed by the Sessions Court.

[6] On appeal to the High Court *vide* Shah Alam High Court Civil Appeal No. BA-12BNCVC-34-06-2017 ("High Court Appeal No. 34"), the High Court dismissed Glomac's appeal and affirmed the Sessions Court's decision.

[7] Glomac's further appeal to the Court of Appeal in that case was also dismissed by the Court of Appeal.

Background

[8] A company known as Score Option Sdn Bhd ("Score Option") was the registered and beneficial owner of all that piece of leasehold property held under Geran HS(D) 112510, No. PT 2063, Mukim and District of Petaling, Selangor Darul Ehsan measuring approximately 200 acres ("said land").

[9] Another company known as Austral Development Sdn Bhd ("Austral Development") was granted the absolute right by Score Option to develop the said land into a housing development known as "Austral Yarra Link".

[10] By a sale and purchase agreement dated 15 January 2010 ("principal agreement") between the plaintiff, Austral Development and Score Option, the plaintiff purchased a two and half (2½)-storey linked house known as Lot No. 69 (Jalan Metro 1/10A) measuring approximately 153 square meters in the Austral Yarra link housing development (said property): see pp. 80 to 103 of exh. NMZ-1 to the plaintiff's affidavit-in-support.

[11] By letter dated 15 January 2010, Austral Development confirmed that they "have fully received the payments for the" said property and that they have no further claims against the said property. By way of the same letter, Austral Development also forwarded the original copy of the sale and purchase agreement and deed of mutual covenant to the plaintiff: see p. 186 of exh. NMZ-1 of the plaintiff's affidavit-in-support.

[12] Receivers and managers ("receivers and managers") of Score Option were appointed on 29 January 2010 pursuant to a debenture dated 10 April 2008 between Malayan Banking Bhd and Score Option.

[13] On 21 January 2011, the receivers and managers of Score Option entered into a sale and purchase agreement ("Glomac agreement") with Glomac for a consideration of RM77 million to sell the said land but strictly excluding 198 houses ("sold units") that were already sold by Austral Development to purchasers in the Austral Yarra Link Development: see pp. 104 to 178 of exh. NMZ-1 to the plaintiff's affidavit-in-support.

[14] By s. 5.02 of the Glomac agreement, the transfer of the said land to the Glomac was subject to the right and interest of the existing purchasers of the sold units: see pp. 119 of exh. NMZ-1 to the plaintiff's affidavit-in-support.

[15] The said property which was purchased by Nordin is one of the 198 sold units and listed at item No. 14 of Appendix B to the Glomac agreement: see p. 140 of exh. NMZ-1 to the plaintiff's affidavit-in-support.

[16] Clause 7A.01 of the Glomac agreement also imposed an obligation upon the Glomac to complete the construction and development of the sold units at its own cost and expenses: see pp. 121 to 122 of exh. NMZ-1 to the plaintiff's affidavit-in-support.

[17] Further thereto, Glomac gave effect to these obligation as set out in cls. 5.02 and 7A.01 by transferring legal and beneficial ownership to other purchasers of such sold units as demonstrated in pp. 373 to 421 of exh. NMZ-1: see pp. 373 to 421 of exh. NMZ-1.

[18] The typical mode of dealing with other purchasers was that Glomac executed two agreements with another purchaser of a sold unit, whereby:

(i) a sale and purchase agreement dated 17 October 2014 was executed between the purchaser and Glomac (pp. 373 to 396) for Glomac to buy the sold unit from the purchaser; and

(ii) a sale and purchase agreement dated 28 July 2015 was executed between the purchaser and Glomac as a developer. This agreement was pursuant to Schedule G of the Housing Development (Control and Licensing) Act 1996 and Housing Development (Control and Licensing) Regulations 1989 (pp. 397 to 421).

[19] It is pertinent to note here that the developer under the principal agreement, Austral Development, is not a party to both the above said agreements.

[20] As outlined above, Glomac by its conduct has given effect to s. 7A.01 of the Glomac agreement by dealing directly with purchasers of the sold units, to the exclusion of Austral Development.

[21] The High Court in the previous proceedings made a finding of fact that "following the literal and unambiguous reading of s. 7A.01(a)(i) of the Glomac agreement clearly stated that Glomac is to complete the construction and development of the uncompleted sold units at its own cost and expenses". The relevant part of the High Court's grounds of judgment is at p. 10 of exh. NMZ-2 to the plaintiff's affidavit-in-support.

[22] Glomac's direct dealing with the purchasers of the sold units, was also confirmed by the deponent of Glomac's affidavit-in-reply, Andrew R Sundram a/l Michael Julian, during his testimony at the trial in the Sessions Court. The relevant oral evidence is at Q&A 21 at pp. 29 to 30 of exh. NMZ-1 to the plaintiff's affidavit-in-support.

[23] Subsequently both Score Option and Austral Development went into winding-up and liquidators were appointed on 5 December 2014 and 20 January 2015 respectively.

[24] On 3 November 2015, Glomac commenced the Shah Alam Sessions Court Suit No. B52NCVC-259-11/2015 against plaintiff for the following main reliefs:

(i) a declaration that the sale and purchase agreement PA dated 15 January 2015 is null and void; and

(ii) a declaration that Glomac is the rightful owner and/or registered and beneficial owner of the said property.

[25] After a full trial, on 30 May 2017, the Sessions Court dismissed Glomac's claim against the plaintiff with cost: see pp. 535 to 537 of exh. NMZ-1 of the plaintiff's affidavit-in-support.

[26] On 7 June 2017, Glomac filed an appeal to the Shah Alam High Court against the decision of the Shah Alam Sessions Court. Glomac's appeal was dismissed with costs on 6 June 2018: see pp. 18 to 19 of exh. NMZ-1 to the plaintiff's affidavit-in-support.

[27] On 29 June 2018, Glomac filed an appeal to the Court of Appeal against the decision of the Shah Alam High Court. The Court of Appeal on 31 May 2019 dismissed Glomac's appeal with cost: see pp. 1 to 2 of exh. NMZ-3 to the plaintiff's affidavit-in-support.

Glomac's Arguments Against Nordin's Originating Summons Herein

[28] Glomac's objections to Nordin's claim in the originating summons herein are premised on the following issues:

(i) the doctrine of *res judicata* prevents the issues raised in this action from being litigated due to the previous court proceedings;

(ii) Nordin does not have the *locus standi* to initiate this action and has no cause of action against the defendant; and

(iii) Glomac is not satisfied that the progress payment for the said property has been made and/or that the principal agreement was *bona fide*.

Res Judicata

[29] It is well-settled law that a party is not allowed to re-litigate the matters or issues which has been decided by the court in a previous suit or action, and the doctrine of *res judicata* operates to bar a person from re-litigating the matter or issues previously decided by the court as between the same parties. *Res judicata* in the wider sense also applies to issues which should have been, but not, raised in the previous proceeding save for exceptional circumstances. Decided authorities include *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 (Supreme Court); *Hoystead v. Commissioner of Income Tax* [1926] AC 155 at pp. 165 to 166 (Privy Council); *Yat Tung Investment v. Dao Heng Bank* [1975] 2 WLR 69 (Privy Council). In *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* (*supra*) the Supreme Court also followed Eusoffe Abdoolcader FCJ's judgment in *Superintendent Of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256; [1986] 1 MLJ 494 at p. 498 that estoppel *per rem judicatam* need not be pleaded.

[30] In addition to *res judicata*, issue estoppel also applies to estop a party from re-litigating the findings of fact which the court has previously decided between the same parties: see *Malayan United Finance Bhd v. Noormurni Sdn Bhd & Anor* [1988] 1 CLJ 149; [1988] 1 CLJ (Rep) 190; [1988] 1 MLJ 395, at 396 (Supreme Court); and *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 (Supreme Court).

[31] In *Prestasia Sdn Bhd v. Mow Wai Lan* [1995] 1 LNS 328; [1997] 2 MLJ 236 at p. 250, the Court of Appeal held that where a defendant has filed a counterclaim in the previous suit but the court did not decide or adjudged on the defendant's counterclaim after having dismissed the plaintiff's claim in the previous suit, the successful defendant can file a subsequent suit for such counterclaim and the subsequent suit for such counterclaim and the subsequent suit to claim for the same subject matter and claim in the counterclaim is not barred by *res judicata*. This principle is good law, and is consistent with the policy against re-litigation on account of *res judicata*.

[32] In our present case, Nordin did not make a counterclaim for declaration that he is the right owner of the said property, and hence the Sessions Court in the previous Suit No. 259 did not give any judgment on any counterclaim.

[33] Nevertheless, in the course of delivering judgment in the previous Suit No. 259, the Sessions Court has expressly held that Glomac was not the rightful owner of the said property and has also expressly and/or impliedly found and concluded that Nordin has been the rightful owner of the said property at all material times. Such findings and/or conclusions of Nordin's rightful ownership to the said property are evident from the following extracts of the Sessions Court's ground of judgment:

(i) the court finds that Nordin is the beneficial owner of the said property: see p. 24 thereof;

(ii) Glomac's purchase from the receivers and managers of Score Option did not include the 198 sold units, and Nordin's said property Unit No. 69 (Jalan Metro 1/10A) is one of the 198 sold units: see pp. 28 to 29 thereof;

(iii) Glomac is not the registered proprietor or beneficial owner of the said property: see p. 31 thereof;

(iv) Glomac's rights did not include the 198 sold units, and no consideration was paid by Glomac for the sold units: see p. 34 thereof; and

(v) the court finds that Glomac has no merit to claim the unit which was owned by Nordin legally and *bona fide*: see p. 35 thereof.

[34] In dismissing the Glomac's appeal and affirming the Sessions Court's decision, the High Court in the High Court Civil Appeal No. 34 *inter alia* stated as follows:

> "This Court finds that [Glomac] has no interest, no *locus standi*, on the sold units": see para [16] at page 10 of the High Court's Grounds of Judgment.

[35] As Nordin did not make any counterclaim in the previous suit and the Sessions Court in the previous suit did not decide on any counterclaim, this court holds and concludes that following the Court of Appeal's decision in *Prestasia Sdn Bhd v. Mow Wai Lan* [1995] 1 LNS 328; [1997] 2 MLJ 236 at p. 250, Nordin is not barred or estopped by *res judicata* from filing and maintaining the present suit for recovery of the said property and related orders which flow from and/or are consequential upon the decisions of the courts in the previous suit. Further or alternatively, due to the exceptional circumstances of the present case, *res judicata* in the wider sense does not apply to bar or estop Nordin from filing the present suit to recover the very same property which the courts in the previous Suit No. 259 have held that the property belonged to Nordin.

[36] As the courts in the previous suit have decided that Nordin is the true owner of the said property and Glomac has no right to or interest in the said property and the appeal has been exhausted, Glomac is barred or estopped by *res judicata* from re-litigation or re-opening the ownership issue in our present suit. Moreoever, issue estoppel also applies to bar or estop Glomac from re-litigating or re-contesting the findings and conclusions of the courts in the previous suit as summarised in paras. 33 and 34 above.

[37] In the premises, this court has the jurisdiction to make orders and grant reliefs in favour of Nordin that flows from or are consequential upon or ancillary to the decision of the courts in the previous suit.

[38] In our present case, Nordin in his originating summons prays for the following orders and/or reliefs:

(i) a declaration that the plaintiff is the legal and beneficial owner of a two and half (2½)-storey linked house known as Lot No. 69, (Jalan Metro 1/10A) measuring approximately 153 square meters in the Austral Yarra Link housing development (said property) which was purchased by way of a sale and purchase agreement dated 15 January 2010 between the plaintiff, Austral Development Sdn Bhd (Company No. 638830-A) and Score Option Sdn Bhd (Company No. 550356-V).

(ii) an order that within 14 days of this order the defendant takes all steps required to vest the legal and beneficial ownership of the said property on the plaintiff by executing all necessary documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff;

(iii) an order that if the defendant fails to comply with prayer (ii) hereinabove within 14 days of this order, the Deputy Registrar of the Shah Alam High Court is authorised to execute all necessary legal documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff to vest the legal and beneficial ownership of the said property on the plaintiff;

(iv) an order that the defendant within 14 days of this order forward to the plaintiff's solicitors all security documents including but not limited to the issue document of title and any other document necessary to vest the legal and beneficial ownership of the said property on the plaintiff;

(v) an order that within 14 days of this order the defendant delivers vacant possession of the said property to the plaintiff;

(vi) the costs of this action is paid by the defendant to the plaintiff; and

(vii) any further or other reliefs deemed fair and just by this Honourable Court;

[39] In light of the fact that (i) Nordin has been adjudged as the rightful owner of the said property; (ii) the court in the previous Suit No. 259 has conclusively held that Glomac has no proprietary right to or interest in the said property; and (iii) the said property has been completely constructed but Glomac, who is holding on to the possession and document of titles of the said property, still refuses to sign a transfer of the said property to Nordin and further refuses to give vacant possession of the said property to Nordin, this court is of the considered view that all the prayers (i) to (vi) of Nordin's originating summons are orders and/or reliefs flowing from or ancillary to or consequential upon the court's decision in the previous Suit No. 259.

Locus Standi And Cause Of Action

[40] Glomac also argued that Nordin allegedly has no *locus standi* to initiate this action and has no cause of action against Glomac.

[41] In challenging Nordin's *locus standi*, Glomac cited the following decided authorities:

(i) *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* [2006] 4 CLJ 458; [2006] 6 MLJ 511 wherein the Court of Appeal held that there must be a written sanction from the official assignee before an undischarged bankrupt can file a suit and that the presence of the officer from the office of the official assignee in court in the proceedings did not show implied consent to continue with the proceedings.

(ii) A sanction must be specific to an action.

[42] This court accepts the general principle that a sanction must be specific and is not meant for multiple proceedings: see *Ketua Pengarah Insolvensi v. Dato' Dr Chen Lip Keong & Ors* [2011] 8 CLJ 393.

[43] In our present case, Nordin is using the sanction for the present suit only, and there is no question of Nordin's alleged or threatened use of the same sanction for another suit. There is no other legal proceeding actual or imminent or threatened by Nordin against Glomac or any other person.

[44] The only factual question in our present case is whether the sanction obtained by Nordin is sufficiently specific for our present suit.

[45] In *Azman Zain Ahmed Mohd Zin v. CIMB Bank Bhd* [2013] 6 CLJ 862, Mary Lim J (now FCJ) held that the sanction can take many forms and no particular format is required, though it should generally be in writing: see para. [11].

[46] In *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* [2006] 4 CLJ 458; [2006] 6 MLJ 511, the Court of Appeal relied partly on the confirmation by the Director General of Insolvency's ("DGI") representative in the court that no formal application was ever made by the undischarged bankrupt in that case before coming to the decision that there

was no sanction from the DGI in that case. This shows that the court can consider information and confirmation of the DGI's representative who appears in court for the proceedings. In *Chew Thai Kay & Anor v. Tenaga Nasional Bhd* [2020] 1 CLJ 97 the High Court was faced with a written consent which was not expressed in clear wording or free from ambiguity. In *Chew Thai Kay*'s case (*supra*), Mohd Radzi Harun JC referred to another written sanction for another separate case and held that although the file number of the case was left blank, the sanction when read in the context was a specific sanction for the case in question and was valid: see paras. [13] to [20].

[47] From the decided authorities, the following principles can be gleaned regarding the sanction of the DGI for the commencement and continuation of a court suit or action:

(i) before there can be a sanction to be issued, there must be a written application by or on behalf of the applicant to the DGI: see s. 38 of Bankruptcy Act 1967 and *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* [2006] 4 CLJ 458; [2006] 6 MLJ 511;

(ii) the sanction issued by the DGI must be specific for a suit or action: *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* [2006] 4 CLJ 458; [2006] 6 MLJ 511;

(iii) the sanction can take many forms and no particular format is required, though it should generally be in writing: see *Azman Zain Ahmed Mohd Zin v. CIMB Bank Bhd* [2013] 6 CLJ 862 at para. [11];

(iv) mere presence of DGI's representative at a proceeding in the suit or action by itself does not constitute the DGI's sanction for that suit or action: see *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* [2006] 4 CLJ 458; [2006] 6 MLJ 511;

(v) where the wording of the written sanction of DGI is ambiguous or imperfect, the confirmation of the DGI's representative in the court and the extrinsic evidence in other related documents can be taken into consideration by the court in deciding whether or not the DGI has in fact given a specific sanction for the suit or action in question: see *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* [2006] 4 CLJ 458; [2006] 6 MLJ 511; *Azman Zain Ahmed Mohd Zin v. CIMB Bank Bhd* [2013] 6 CLJ 862 at para. [10]; and *Chew Thai Kay & Anor v. Tenaga Nasional Bhd* [2020] 1 CLJ 97 paras. [13] to [20]; and

(vi) analogous with interpretation of contract terms or written law, it is in principle not objectionable for external aids to be used in interpretation of a written consent or sanction.

[48] In our present case, the facts and events in connection with the question of consent were as follows:

(i) On 16 May 2018, Nordin was adjudged a bankrupt.

(ii) By solicitors Nayagam & Partner's letter dated 4 October 2019, Nordin applied to DGI under s. 38(1) of Bankruptcy Act 1967 for consent to commence this suit against Glomac: see exh. NMZ-1 to plaintiff's affidavit jawapan affirmed on 18 February 2020. The contents of Nayagam & Partner's letter dated 4 October 2020 are as follows:

> Per: Permohonan Bankrap Untuk Sanksi Di Bawah Seksyen 38(1)(a) Akta Kebankrapan 1967
>
> Tindakan Yang Di Cadangkan Terhadap Glomac Alliance Sdn Bhd oleh Nordin Bin Md Zain
>
> Kami merujuk kepada perkara tersebut di atas di mana kami mewakili Nordin Bin Md Zain.
>
> Bersama-sama surat ini melampirkan dokumen-dokumen berikut untuk permohonan sanksi
>
> (i) Borang A;
> (ii) Sesalinan Aku Janji Bankrap oleh Nordin Bin Md Zain;
> (iii) Sesalinan Aku Janji Peguam oleh Thisinayagam a/l A Somasundram;
> (iv) Kronologi dan Fakta Kes;
> (v) Merit Kes;
> (vi) Kausa Tindakan;
> (vii) Perjanjian Jual Beli Bertarikh 15.1.2010
> (viii) Perjanjian Jual Beli Bertarikh 21.1.2011
> (ix) Surat kami bertarikh 10.7.2019
>
> Sila akui penerimaan di sesalinan surat ini.

(iii) In response, DGI by letter dated 9 October 2018 asked Nordin's solicitors to provide more information and documents including cause papers (such as writ of summons, statement of claim, etc) and statement of affairs: see exh. NMZ-2; this DGI's letter referred to Nayagam & Partners' letter reference NP/L/655/NMZ/2015;

(iv) By letter reference NP/L/655/NMZ/2015 dated 21 October 2019, Nordin's solicitors provided to the DGI draft originating summons and draft affidavit-in-support of Nordin. The contents of Nayagam & Partners' letter dated 21 October 2019 were as follows:

> Per: Permohonan Bankrap Untuk Sanksi Di Bawah Seksyen 38(1)(a) Akta Kebankrapan 1967

Tindakan Yang Di Cadangkan Terhadap Glomac Alliance Sdn Bhd oleh Nordin Bin Md Zain

Kami merujuk kepada perkara tersebut di atas di mana kami mewakili Nordin Bin Md Zain. Kami juga merujuk kepada surat kami bertarikh 4.10.2019 dan surat tuan bertarikh 9.10.2019.

Seperti yang diarahkan, bersama-sama surat ini kami melampirkan dokumen-dokumen berikut untuk tindakan lanjut tuan:

(i) Borang A;

(ii) Sesalinan Aku Janji Bankrap oleh Nordin Bin Md Zain;

(iii) Sesalinan Aku Janji Peguam oleh Thisinayagam a/l A Somasundram;

(iv) Kronologi dan Fakta Kes;

(v) Merit Kes;

(vi) Kausa Tindakan;

(vii) Perjanjian Jual Beli Bertarikh 15.1.2010

(viii) Perjanjian Jual Beli Bertarikh 21.1.2011

(ix) Surat kami bertarikh 10.7.2019

Sila akui penerimaan di sesalinan surat ini.

(see exh. NMZ-3) This letter was received by DGI on 25 October 2019 with the DGI's rubber stamp affixed and date of receipt stamped thereon as 25 October 2019.

(v) By letter dated 31 October 2019 and referring to Nordin's solicitors' reference NP/L/655/NMZ/2015, the DGI issued the written sanction in the following words:

DALAM PERKARA KEBANKRAPAN NO. BA-29NCC-8236-09/ 2017

BER : Nordin Bin Md Zain

NO. K/P: 490729-04-5129
MAHKAMAH TINGGI DI SHAH ALAM
GUAMAN NO. : BELUM DIFAILKAN
TARIKH PENDENGARAN KES: BELUM DITETAPKAN
PERMOHONAN DI BAWAH SEKSYEN 38(1)(a) AKTA INSOLVENSI 1967

Saya dengan hormatnya di arah merujuk kepada perkara di atas dan surat tuan bertarikh 25.10.2019.

2. Adalah dimaklumkan bahawa Ketua Pengarah Insolvensi telah meluluskan sanksi untuk tuan memulakan dan meneruskan tindakan di Mahkamah Tinggi di Shah Alam bagi Guaman No: Belum difailkan dan melantik Tetuan Nayagam & Partners untuk mewakili tuan dalam tindakan guaman tersebut dan rayuan-rayuan yang berbangkit daripada kes ini.

A 3. Sila ambil maklum perkara-perkara yang berikut:

(a) Ketua Pengarah lnsolvensi Malaysia tidak akan bertanggungjawab dan tidak boleh dipertanggungkan sama sekali atas apa-apa kegagalan, kerugian dan apa-apa kos yang terlibat atau yang dikenakan oleh mana-mana pihak yang terlibat dalam dan/atau
B yang berbangkit daripada guaman tersebut dan kegagalan, kerugian dan apa-apa kos hendaklah ditanggung oleh Bankrap sendiri;

(b) Sekiranya keputusan Mahkamah dalam tindakan guaman tersebut memihak kepada tuan, apa-apa wang, pampasan dan faedah yang diterima oleh tuan hendaklah diserahkan kepada Ketua Pengarah lnsolvensi Malaysia untuk dimasukkan ke dalam estet kebankrapan
C tuan bagi faedah pemiutang-pemiutang;

(c) Pihak tuan hendaklah memaklumkan kepada Ketua Pengarah lnsolvensi berhubung dengan rayuan yang akan difailkan ke Mahkamah yang lebih tinggi. Sekiranya pihak tuan yang memulakan rayuan, sesalinan notis rayuan hendaklah diserahkan kepada
D cawangan Jabatan lnsolvensi Malaysia yang mengeluarkan sanksi;

(d) Sebarang pertukaran peguamcara / firma guaman yang mengendalikan kes / rayuan hendaklah dimaklumkan kepada Ketua Pengarah lnsolvensi dan peguamcara yang baru hendaklah mengemukakan sanksi yang baru; dan

E (e) Keputusan rayuan kes hendaklah dimaklumkan kepada Ketua Pengarah lnsolvensi.

Sekian, terima kasih.

(see exh. NMZ-4)

F (vi) Through Nayagam & Partner's letter reference NP/L/655/NMZ/2015 dated 25 November 2019 (received by Glomac on 28 November 2019), Nordin's solicitors served the notice of demand on Glomac together with a copy of DGI's sanction letter dated 31 October 2019: see exh. NMZ-5.

G (vii) This suit was filed by Nordin on 29 January 2020. By Glomac's solicitors' letter dated 31 January 2020, Glomac for the first time raised objection to DGI's sanction on ground that it did not name Glomac as the defendant and did not state the scope and type of proceedings sanctioned: see exh. NMZ-6.

H **[49]** In the course of proceedings in the present suit, representatives of DGI at several occasions attended court and confirmed that the sanction of DGI was for the specific purpose of Nordin's suit against Glomac in connection with the said property, including the following confirmations:

I (i) On 21 February 2020, DGI's representative Cik Fatin Khairi attended case management before the Registrar and confirmed that sanction for this suit was obtained by Nordin on 31 October 2019 before the

commencement of this suit consistent with s. 38(1) of the Insolvency Act 1967: see para 6(i) of plaintiff's affidavit tambahan affirmed on 16 March 2020.

(ii) On 21 February 2020, Cik Fatin Khairi also confirmed to the court that she had perused the originating summons and affidavit-in-support filed in the present suit by comparing with the draft originating summons and draft affidavit-in-support which were sent to DGI by Nordin's solicitors on 25 October 2019 in exh. NMZ-3 and found them to be identical: see para. 6(ii) of plaintiff's affidavit tambahan affirmed on 16 March 2020.

(iii) In the written submission filed by DGI's representative on 3 June 2020 (court encl. 27), the DGI's representative confirmed in writing that the DGI's sanction dated 31 October 2019 was specifically for Nordin's present suit against Glomac in respect of the said property, and, according to the DGI's office, is a valid sanction.

(iv) At the hearing of the originating summons on 7 September 2020. DGI's representative attended court and confirmed again that the DGI's sanction dated 31 October 2019 was specifically for this suit by Nordin against Glomac, the draft originating summons and draft affidavit-in-support sent together with Nayagam & Partner's letter dated 21 October 2019 were identical with the originating summons and affidavit-in-support filed herein, and that Nordin has made a formal application for the sanction to file this suit against Glomac but Nordin did not, and has not, applied to DGI for any other suit or proceeding.

[50] Applying the principles decided in *Azman Zain Ahmed Mohd Zin v. CIMB Bank Bhd* [2013] 6 CLJ 862; *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* [2006] 4 CLJ 458; [2006] 6 MLJ 511; and *Chew Thai Kay & Anor v. Tenaga Nasional Bhd* [2020] 1 CLJ 97, this court finds that on the facts of the present case that Nordin obtained a specific sanction for the present suit before filing this suit.

[51] In the premises, this court rejects Glomac's argument on *locus standi*.

[52] As Nordin has the *locus standi* and the courts in the previous Suit No. 259 decided that Nordin was the true beneficial owner of the said property and Glomac has no rights to or interest in the said property, Nordin has a good and valid cause of action against Glomac.

Payment For The Said Property And *Bona Fides* Of The Principal Agreement

[53] Among others, the courts in the previous Suit No. 259 found and held that:

(i) Nordin had fully paid the purchase price for the said property by way of contra set-off;

(ii) the contra set-off was *bona fide* and valid; and

(iii) Nordin was the true beneficial owner by virtue of having fully paid the purchase price for the said property pursuant to the principal agreement and Glomac has not paid any consideration for the 198 sold units (of which the said property is a unit thereof).

[54] This court finds and holds that *res judicata* applies to bar or estop Glomac from re-litigating the decisions of the courts in the previous Suit No. 259.

[55] Further or alternatively, issue estoppel applies in the present suit to bar or estop Glomac from questioning the findings of the court in the previous Suit No. 259: see principle of issue estoppel in *Malayan United Finance Bhd v. Noormurni Sdn Bhd & Anor* [1988] 1 CLJ 149; [1988] 1 CLJ (Rep) 190; [1988] 1 MLJ 395 (Supreme Court).

[56] In the premises, this court rejects Glomac's argument against the fact that full payment has been made by Nordin for the said property and also dismisses Glomac's argument against the *bona fides* of the principal agreement or the *bona fides* of the contra payment.

[57] In the previous Suit No. 259, the *bona fides* of the principal agreement was one of the foundational facts of the court's decisions therein. *Res judicata* in the wider sense applies here to bar or estop Glomac from questioning the *bona fides* of the principal agreement and the *bona fides* of the contra payment: see *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 (Supreme Court); and *Hoystead v. Commissioner of Income Tax* [1926] AC 155 at pp. 165 to 166 (Privy Council).

Conclusion

[58] By reason of the aforesaid, this court has held and concluded that Nordin, as the true owner of the said property, is entitled to have the title of the said property transferred to him free from encumbrances and also the vacant possession of the said property.

[59] Accordingly, this court on 15 September 2020 granted the following orders and reliefs in favour of the plaintiff/Nordin:

(i) A declaration that the plaintiff is the legal and beneficial owner of a two and half (2½)-storey linked house known as Lot No. 69, (Jalan Metro 1/10A) measuring approximately 153 square meters in the Austral Yarra Link housing development (said property) which was purchased by way of a sale and purchase agreement dated 15 January 2010 between the plaintiff, Austral Development Sdn Bhd (Company No. 638830-A) and Score Option Sdn Bhd (Company No. 550356-V).

(ii) An order that within 28 days of this order the defendant takes all steps required to vest the legal and beneficial ownership of the said property on the plaintiff by executing all necessary documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff;

(iii) An order that if the defendant fail to comply with prayer (ii) hereinabove within 28 days of this order, the Deputy Registrar of the Shah Alam High Court is authorised to execute all necessary legal documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff to vest the legal and beneficial ownership of the said property on the plaintiff;

(iv) An order that the defendant within 28 days of this order forward to the plaintiff's solicitors all security documents including but not limited to the issue document of title and any other document necessary to vest the legal and beneficial ownership of the said property on the plaintiff;

(v) An order that within 28 days of this order the defendant delivers vacant possession of the said property to the plaintiff; and

(vi) The defendant/Glomac is given the liberty to apply for extension of time for orders (ii), (iv) and (v) above in the event of occurrence of any impossibility or inability to comply with the 28 days' time frame stipulated above.

[60] After hearing the counsel for the respective parties, this court assessed and awarded costs in favour of the plaintiff/Nordin in the sum of RM20,000/= for encl. 1 (originating summons).